IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-0254

Jackson County No. LACV028195

PATRICIA GERARDY, as
Conservator for Wilma Poll
Appellant/Plaintiff

Vs.

KENNETH POLL,
Appellee/Defendant.

Appeal from the Iowa District Court in and for Jackson County
The Honorable Stuart Werling, Judge

APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE

I hereby certify that on the 10th day of October, 2018, I, the undersigned, did serve a copy of this brief on all other parties to this Appeal for review by electronically filing on the EDMS system.

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CERTIFICATE OF FILING

I, Matthew L. Noel, hereby certify that I will file the attached Final Brief by electronically filing on the EDMS System.

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ROUTING STATEMENT

This case presents issues concerning the application of existing legal principles and therefore transfer to the Court of Appeals is appropriate pursuant to Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case proceeded to jury trial on December 4, 2017. The jury returned a verdict for in favor of the Defendant on December 6, 2017. (App. 134). On December 13, 2016, the Plaintiff filed a combined Motion for New Trial and Judgment Notwithstanding the Verdict, and on January 26, 2018 a hearing was held on the Motions. The District Court filed an Order denying the motion the same day and the Plaintiff filed a timely Notice of Appeal on February 12, 2018,

and on February 21, 2018 the Defendant filed a cross appeal, which Appellee now withdraws contemporaneously with this brief.

STATEMENT OF FACTS

On September 8, 2015, Wilma Poll entered into a contract with her son, Kenneth Poll, to sell approximately 41 acres of land for $24,000.00. (App. 141). The terms of the contract were essentially that Kenneth would pay $4,000.00 down and make structured payments over the next five years at 4.8% interest. At the end of the life of the contract, Mr. Poll would own the land subject to a life estate granted to Wilma Poll in the house and the 6 acres surrounding the house as well as the buildings located on that section. (App. 141). The contract was drafted by Wilma Poll's attorney, Steve Kahler. (App.106-107). Prior to signing the contract, Mr. Kahler met with Wilma alone to ensure she indeed wanted to sell the farm, as well as to assess her cognitive abilities. (App. 107-108). On the day the contract was signed, September 8, 2015, Mr. Kahler once again met with Wilma Poll prior to bringing Kenneth into the room to ensure she was competent to sign the document. (App. 111). Mr. Kahler felt confident based on his two interactions with Ms. Poll she was competent to sign the contract, she knew the purchase price, and what she was selling to her son Kenneth. Further, he determined she was acting freely, intelligently, and voluntarily. (Id.)

After the contract was signed, Wilma Poll's other children discovered the existence of the contract and believed their mother was not fit or competent to sell the farm to Kenneth. (App. 50). On September 16, 2015, the now conservator, Patricia Gerardy, one of Ms. Poll's daughters, took Ms. Poll to an appointment with Dr. Jerald W. Bybee, from Maquoketa, Iowa. (App. 36, 51). Prior to September 16, 2015, there were no indications in any of Ms. Poll's medical records she was not competent or that there was any mental illness of any kind. (App. 58).

At the appointment, Dr. Bybee performed a "Mini-Mental Status Exam" on Ms. Poll. After scoring it, he stated he believed she was moderately impaired. (App. 37-38). Dr. Bybee also stated if there were any problems with his opinion, Ms. Poll could benefit from a second opinion, specifically from Dr. Rodger Shafer, who is a geriatric psychiatrist in Dubuque. (App. 42).

Based on this information, Patricia Gerardy petitioned for Guardianship and Conservatorship of her mother. This was granted by the District Court in April of 2016. (App. 42). After the Guardianship and Conservatorship were established, Mr. Poll sent a $20,000.00 check to Ms. Poll's conservator, Ms. Gerardy, to complete the contract for the sale of land. (App. 116-117). In response in July of 2016, Wilma Poll, acting through her conservator Patricia Gerardy, filed a lawsuit against Kenneth Poll stating he used undue influence in securing the contract with his mother and that Ms. Poll lacked the capacity to enter into such a contract. Mr.

Poll Answered, denying these claims and counterclaimed that Patricia Gerardy, acting as conservator for Wilma Poll, had breached the contract. (App. 6-8, 9-10).

The matter proceeded to trial on December 4-6, 2017. At trial, the Plaintiff presented evidence in the form of opinion from Patricia Gerardy and other lay witnesses that they believed Mr. Poll had a confidential and fiduciary relationship with his mother, as well as Ms. Poll was not competent to enter into the contract with Mr. Poll. The Plaintiff presented evidence by Thomas Howe of Kane Appraisal Services that it was Plaintiff's belief the farm was worth approximately $368,000.00. (App. 63, 175). Most notably, evidence was presented from Dr. Bybee, whom was designated as an expert witness, stating that he believed that on September 8, 2015 the Plaintiff, Wilma Poll, would have lacked the mental capacity to have entered into a contract. (App. 40). Conspicuously, the Plaintiff did not present Dr. Bybee with any questions about the medical or legal definition of competency, or what understanding Ms. Poll may have had at the time. Most notably under cross examination, Dr. Bybee admitted he did not administer the test fully, the test was not designed to be used in a stand-alone fashion, and the test did not measure cognitive ability. (App.41-47).

At the close of the Plaintiff's evidence, both the Defendant and the Plaintiff moved for a directed verdict. (App.99-106). Both Motions for Directed Verdict were denied, however when the Court denied the Plaintiff's Motion for Directed

Verdict, the Court stated that the Plaintiff did not have the ability to ask for a directed verdict in its favor. (App. 106). As the Defendant stated in his objection, a Directed Verdict is relief that can be used for the dismissal of claims, not for the summary entry of a claim. (App.126).

The Defendant testified his mother had expressed interest in selling him the farm for years, and when this parcel of land was originally bought it was offered to him first. (App. 90, 91). However, at the time, his parents were in a better financial situation and bought the farm land. The Defendant testified his mother desired that he have the land for the same price his parents had paid for it years before. (App.92). Mr. Poll felt the price was too low and he and his mother worked out an agreed price of $600.00 an acre, which was only slightly higher then the $400.00 an acre his parents had paid in 1973. (App. 93).

The Defendant further testified he arranged to take his mother to the law office which had represented her for as long as he could remember, Schoenthaler, Bartelt, Kahler & Reicks, to have the contract drafted. (App. 92).

Attorney Steven Kahler testified he had met with Wilma Poll on two separate occasions and he had no doubt that she was competent to sign the contract for the sale of real estate. (App.108-109). After the Defendant rested, the parties again moved for Directed Verdicts, both on the same grounds which they had previously moved, and the Court again denied both Motions. (App. 123-131).

At the close of all evidence, the Court reversed an earlier ruling and read an instruction directing the jury to ignore evidence presented by the Plaintiff in which Magistrate John Kies deemed the Defendant's testimony to not be credible in an unrelated hearing.(App. 140). The Court also struck Plaintiff's Exhibit 7, which was a copy of Magistrate Kies' opinion. (App. 131). At the time, the Plaintiff objected to the instruction, but did not move to reopen the record to present any new evidence. (App.132-133). After deliberating for approximately two hours, the jury returned a verdict answering all the special interrogatories and finding in favor of the Defendant. (App 134-136). On December 13, 2017, the Appellant filed post-trial motions asking for relief in the form of a new trial and for a Judgment Notwithstanding the Verdict. (App. 236). A hearing was held on the Motions on January 26, 2018, and were denied by the court the same day. (App. 244-245). On February 12, 2018, Ms. Gerardy filed her Notice of Appeal. (App. 246).

ARGUMENT

The Court did not error in denying the Plaintiff's Motion for a New Trial or Motion for Judgment Notwithstanding the Verdict. The Plaintiff is attempting to cloud the issues with the Court and turn the Court into a second finder of fact in these proceedings. Case law makes clear that is not the role of either the District or the Appellate Court in a jury trial. There was substantial evidence presented to the

jury and the proceedings were in accordance with the laws and rules of the State of Iowa, therefore, the Plaintiff is not entitled to any relief.

Further, the Appellee believes the Appellant has failed to preserve error, nor raises or analyzes any issue which the Appellate Court can review. In her Issues II and III, the Appellant asks the court to review the sufficiency of evidence as it relates to a jury trial. As discussed further below, an Appellate Court does not review jury verdicts for sufficiency of evidence. Instead a Court reviews the Trial Court's decision denying a new trial and applies its decision to the Trial Court's decision. Although the Appellant references the standard of review for a new trial, her brief is bereft of any analysis or application of these standards to the facts of the case. In Issue IV, the Appellant states a general standard of review for Motions for a New Trial, and no review standard for Judgment Notwithstanding the Verdict. For all issues, the Appellant cited so little case law that Mr. Poll has essentially been left to interpret what the actual issue argued is and respond accordingly.

"In evaluating a Motion for a Judgment Notwithstanding the Verdict, the only task of a Court is to ask whether a fact question was generated." *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa, 2010). When evaluating a Motion for Directed Verdict or a Motion for Judgment Notwithstanding the Verdict, the Court views the evidence in light most favorable

to the party against whom the Motion is intended, the non-moving party. *Id.* "A party may move for a dismissal of any action or claim *against* the party or for any appropriate order of court, if the party asserting it fails to comply with the rules of this chapter or any order of court. *After a party has rested, the adverse party may move for dismissal because no right to relief has been shown under the law or facts*, without waiving the right to offer evidence thereafter." Iowa R. of Civ. Pro. 1.945. (Emphasis added). "In reviewing whether a new trial is needed for lack of substantial evidence a court views the evidence in light most favorable to the verdict, taking into consideration all reasonable inferences the jury may have made." *City of Cedar Falls v. Cedar Falls Community School District*, 617N.W.2d 11, 16 (Iowa 2000). "Evidence is substantial if reasonable minds would accept the evidence as adequate to reach the same findings." *Crow v. Simpson,* 871 N.W.2d 98, 105 (Iowa, 2015). "Evidence is not insubstantial merely because Courts may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding." *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 41 (Iowa 2012). "The jury is free to accept or reject any testimony, including uncontroverted expert testimony." *Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Constr., Inc.*, 445 N.W.2d 789, 791-92 (Iowa 1989).

I. The Plaintiff Is Not Entitled to a New Trial

Grounds for new trials are embodied in Iowa Rule of Civil Procedure 1.1004. The rule lists nine separate grounds for the grant of new trial. "On motion, the aggrieved party may have an adverse verdict, decision, or report or some portion thereof vacated and a new trial granted if any of the following causes materially affected movant's substantial rights: **(1)** Irregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial. **(2)** Misconduct of the jury or prevailing party. **(3)** Accident or surprise which ordinary prudence could not have guarded against. **(4)** Excessive or inadequate damages appearing to have been influenced by passion or prejudice. **(5)** Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property. **(6)** That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. **(7)** Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial. **(8)** Errors of law occurring in the proceedings, or mistakes of fact by the court. **(9)** On any ground stated in rule 1.1003, the motion specifying the defect or cause giving rise thereto." Iowa R. Civ. Pro. 1.1004. Ms. Gerardy asked the Trial Court to grant her a new trial pursuant to subsections 1, 3, 6 and 9 of the rule, none of which have any merit under the case law.

In general, the Supreme Court has given some guidance to determine if a new trial should be granted. "Although trial courts have discretion in ruling on a Motion for a New Trial, that discretion is not unlimited, such discretion can be exercised only for sound judicial reasons, and must not be exercised arbitrarily." *Wilson v. IBP Inc.*, 558N.W.2d 132 (Iowa 1996). "The Court has no right to set aside a jury verdict just because it may have reached a different conclusion." *Matter of Estate of Hughbanks*, 506 N.W.2d 451 (Iowa Court of Appeals 1993).

A. The Trial Court Did Not Error in Denying the Appellant's Motion for New Trial as There Was No Surprise or Irregularities at Trial.

a. Preservation of Error

Mr. Poll believes the Appellant did not preserve error on this issue. Although the Appellant did object to the curative jury instruction and the striking of exhibit number 7 which reversed its prior ruling allowing a credibility determination into evidence, the Appellant did not move to reopen the record at the time of the objection, therefore the Court has no basis to evaluate what the Appellant's argument would have been and whether or not the Trial Court was correct in denying that. Further, in both its Motion for Trial and its brief, the Appellant states it had forgone the presentation of her evidence because the Trial Court had originally allowed the credibility evidence to be presented to the jury. However, in neither its Motion for New Trial or its brief has the Appellant disclosed what this

evidence is or what it contains. The Appellee believes this is analogous to an Offer of Proof, in which the Appellant Court is without the ability to review whether or not the Court should have allowed the record to be reopened because there is no information as to what the evidence was or might have been. Finally, the Appellee believes the Appellant has waived this argument in front of this Court as her Arguments section does not cite any authority in support of her argument. Mr. Poll believes this waiver is in harmony with Iowa R. App. Pro. 6.903(2)(g)(3).

b. Standard of Review

Appellee agrees because the grounds for the Motion for a New Trial arise from an evidentiary ruling by the Trial Court, therefore review on this issue is for Abuse of Discretion.

c. Argument

In her Motion for a New Trial, the Appellant stated she was entitled to a new trial because there was irregularity or surprise at trial which not could have been guarded against pursuant to subsections (1) and (3) of Iowa R. Civ Pro. 1.1004. Both of these grounds are based on the Trial Court's reversal of its prior ruling in admitting into evidence testimony and the opinion of Magistrate John Kies, in which Magistrate Kies found the Defendant, Kenneth Poll to not be credible in an unrelated hearing. As Iowa Courts have long held, fixing errors in a trial or in the

course of a court proceeding is not only allowed, but preferred for the expedient administration of justice.

"We are not prepared to hold that if during the trial of the issues of an action a Court becomes convinced of an error he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain." *Richmond v. Board of Supervisors for Muscatine Co.*, 42 N.W. 422, 426 (Iowa 1889). "Moreover, except for adjudications under rule 105, [now rule 1.441] district court rulings in a case ordinarily do not prevent that court, either through the same or another judge, from ruling otherwise in the later progress of the case." *Avoca State Bank v. Merchants Mut. Bonding Co., 251* N.W.2d 533, 539 (Iowa 1977). "A trial judge may usually correct his or her own rulings or that of another judge of the same court any time before final judgment." *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). "Finally, we reject Smith's argument that his postconviction counsel violated a duty in not resisting the district court's decision to revisit its prior ruling on the statute of limitations issue. It is well-established a district court may correct its prior ruling any time before final judgment." *Smith v. State*, 542 N.W.2d 853, 854 (Iowa App. 1995). "By objecting to testimony barred by the Statute of Frauds defendant was not raising a new defense. There was no change in position, no new issue, no surprise. There can be no claim of surprise when in the trial of a lawsuit there is an objection to testimony

made incompetent by statute." *Huston v. Gelane Co.*, 119 N.W.2d 188, 190, 254 Iowa 752, 756 (Iowa 1963). "We have repeatedly held that Rules of Civil Procedure have the force and effect of statutes." *Krebs v. Town of Manson,* 129 N.W.2d 744 (Iowa 1964).

The precedent quoted above makes two propositions extremely clear. First, the Iowa Appellate Courts have held for over 100 years that Trial Courts are free and even encouraged to correct errors in proceedings as the proceedings are developing. The *Richmond* Court made it clear that not allowing a court to do so would not only be an impediment to the speedy disposition of justice, but also would result in more reversals at the appellant level. The Appellate Courts of this state have reaffirmed this idea multiple times since the *Richmond* Court articulated this standard in 1889. Secondly, as made clear by the *Huston* Court, evidence that is inadmissible by rule or statute cannot be claimed as a surprise in grounds for a new trial. It is unclear as to the exact text of the rule at the time the *Huston* Court made this determination, however the text in rule 1.1004 states in which circumstances a party can claim an accident or surprise "which ordinary prudence could not have guarded against." Iowa R. Civ. Pro. 1.1004(3). The principle laid down in *Huston* embodies this: it is the job of the parties to research the law and to be prepared for trial. A party cannot claim surprise merely because the evidence it decided to rely upon in its trial strategy is deemed inadmissible at the trial itself.

In the case at bar, the Appellant claims she is entitled to a new trial because the Court reversed its prior ruling admitting into evidence direct testimony regarding an outside of court Order which was made by Magistrate John Kies in a separate proceeding involving the Appellee, Kenneth Poll. In that Order, the Magistrate found Kenneth Poll's testimony to be not credible. The Plaintiff asked the Defendant on direct examination about this Order and moved to have the Order admitted into evidence. (App.72-73). The Defendant objected timely, stating this evidence was inadmissible pursuant to Iowa R. Evid. 5.608 as well as hearsay with no known exception. (Id.) During the trial, the Court overruled the objection and allowed the Defendant to be questioned about the Magistrate's Order and allowed the Order admitted into evidence as Exhibit #7. (Id).

During argument for jury instructions, the Defendant made a Motion for a Mistrial and proposed a jury instruction to the Court asking the Court to revisit its ruling on the admissibility of the evidence and instruct the jury accordingly. (App. 129-131). Iowa Rule of Evidence 5.608 regulates the admissibility of evidence for truthfulness and untruthfulness. Appellee's counsel pointed out the Rule only calls for specific incidents to be entered into evidence on cross examination, not direct examination as the Plaintiff was allowed to do. Secondly, specific incidents of conduct are not provable by extrinsic evidence, which Exhibit #7 clearly was.

Finally, the only admissible evidence for truthfulness and untruthfulness is opinion and reputation of those character traits.

Mr. Poll presented the Court with the ruling in *State v. Green*, 593 N.W.2d 24, 28 (Iowa 1999). In *Green*, the Supreme Court was faced with a striking similar circumstance to the evidence in question. In that case, a criminal defendant's attorney made an offer of proof, attempting to introduce Federal District Court Judge Jarvey's Written Order that an officer testifying in a case had lied on an affidavit. The Court ruled this evidence was inadmissible pursuant to Rule 5.608 because it was not opinion or reputation testimony. Secondly, it dealt with a specific incident and finally it was extrinsic evidence, all of which are excluded by the Rule. As the Court has stated, Rules are treated as statutes in case law analysis.

The Appellant cannot claim an irregularity in this case because the Court corrected its previous mistake. Nor can she claim surprise because she failed to exercise her due diligence and research the matter of the admissibility of this evidence. If this had been done, the Plaintiff would have found the evidence is inadmissible pursuant to case law precedent and pursuant to the rules.

Finally, in her argument the Appellant takes the incredible leap that by correcting its prior ruling, the Court unknowingly vouched for Mr. Poll. However, the Appellant fails to support this argument with any authority and because this

argument was not advanced at the trial level the Appellee believes this argument has been waived.

B. The Trial Court Properly Denied the Appellant's Motion for a New Trial because Substantial Evidence Supported Mr. Poll's Assertion He Acted in Good Faith.

a. Preservation of Error

Appellee disagrees that error has been adequately preserved on this issue. While the Appellee agrees this argument was raised in the Appellant's Motion for a New Trial, the Appellee believes this argument has now been waived. In her proof brief, the Appellant has stated to the Appellant Court the jury has erred in its findings. This is not a proper issue for review for a reviewing court. Rather, the Court instead has to review the Trial Court's determination of a Motion for a New Trial. Although the Appellant does state in her standard of review section a general statement about how a court reviews a new trial, she did not cite specific test as it relates to this issue. In her arguments section, the Appellant's analysis is bereft of any mention or analogy to any authority or any case law on how the trial court erred in denying her Motion for a New Trial and any test or standard the Appellant Court is to apply while reviewing this issue. The Appellee also believes error of preservation fails on this issue, because in her Motion for a New Trial, and in her brief, the Appellant claims the jury should take expert testimony in higher

regard than lay testimony when it comes to the mental status of her mother, Mrs. Poll. However, jury instruction 16 explicitly told the jury it may reject, accept or give as much weight to the expert testimony as it saw fit. Appellant's counsel did not object to this instruction being included and read to the jury.

b. Standard of Review

The Supreme Court Reviews a District Court's ruling on the sufficiency of the evidence for corrections of errors at law. *Crow v. Simpson*, 871 N.W2d 98, 105 (Iowa 2015).

c. Argument

In her brief, Appellant's second issue is a contention the jury erred in finding Mr. Poll met his burden in rebutting the presumption the transaction was fraudulent. Although this is the contention of the Appellant, she does nothing more than rehash the same arguments made to the jury in closing argument.

The case law firmly establishes the only question in a sufficiency of evidence analysis is whether or not jury question was generated. In reviewing whether a verdict is supported by substantial evidence, we view the evidence in the light most favorable to the verdict, taking into consideration all reasonable inferences the jury may have made. *City of Cedar Falls v. Cedar Falls Community School District*, 617 N.W. 2d 11, 16 (Iowa 2000). "Evidence is not insubstantial merely because a court may draw a different conclusion from it; the ultimate question is whether it

supports the finding actually made, not whether the evidence would support a different finding." *Postell v. Am. Family Mut. Ins. CO.*, 823 N.W.2d 35, 41 (Iowa 2012). "Further, the jury is free to accept or reject any testimony, including uncontroverted expert testimony." *Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Constr., Inc.*, 445 N.W.2d 789, 791-92 (Iowa 1989).

The Plaintiff's Motion essentially asks the Court in this case to second guess the jury's findings to the special interrogatories whether Ms. Poll acted freely, intelligently, and voluntarily; and whether Mr. Poll remained in good faith during the transaction. While the evidence could support a different finding, the Court in this case is required to view the evidence in light most favorable to the verdict. Here, the Defendant testified he in fact took his mother to her attorney's office to draft the documents, there was a considerable amount of time between receiving the contract and his mother signing the contract, and the Defendant remained unrepresented during the transaction. (App. 92). A jury sitting on this case could have found that all of these actions constitute good faith on the part of the Defendant. Secondly, a jury could have found on the evidence presented that Ms. Poll was competent and did understand the contract. During cross examination, Dr. Bybee agreed with the scholarly research he was cross-examined with, specifically that the MMSE, the only test he performed on Ms. Poll, should never be used as a stand alone test to determine whether or not a patient has memory problems. Next,

Dr. Bybee admitted he did not give the alternative test for the Serial Sevens test, in which a patient can spell the word "world" backwards. (App. 43-47). If he had given this option to Ms. Poll, she could have scored as high as 25 on the test, which would have shown no impairment whatsoever. Further, Dr. Bybee agreed with the scholoraly research that the MMSE does not measure cognitive ability; it is simply a memory test. This means Ms. Poll could have fully understood the terms of the contract when she signed it. Finally, Dr. Bybee, in his letter which was entered into evidence, advised the Guardian/Conservator that Ms. Poll should be seen by another physician specializing in geriatric psychiatry. This advice was not followed. Aside from this single test on this single day, there was absolutely no evidence presented at Court that at the time of the contract signing Ms. Poll did not understand the nature of the transaction she was entering into.

However, all of that can be considered moot because a jury is free to reject even uncontroverted expert testimony, if it chooses. Jury Instruction 16 in this case reads in pertinent part "[c]onsider expert testimony just like any other testimony. You may accept it or reject it, you may give it as much weight as you think that it deserves, considering the witness' education and experience, the reasons given for the opinion and all other evidence in the case." (App. 138). This instruction was read to the jury and was not objected to by the Plaintiff. In its argument to the Court the Plaintiff now asserts, for the first time, that expert testimony should be

taken in higher regard than any other testimony. Assuming the Plaintiff has not waived this argument by failing to object to the aforementioned jury instruction in a timely matter at trial, this argument fails immediately upon its merits. As quoted above, the Court has stated numerous times that expert testimony is not to be held in any higher regard than lay testimony.

The Plaintiff attempts to cloud this issue by quoting a case in which the Supreme Court stated the Trial Court erred by not giving more weight to an expert's testimony about a decedent's state of mind. *VanDyke's et al v. Benton County Bank and Trust Co. et al,* 65 N.W.2d 63 (Iowa 1954), (Appellants brief page 6.) However, the Plaintiff cites only one sentence of that case and does not disclose the rest of the facts of that case. In *Van Dyke,* the Court continued, "We express no opinion as to the weight which should have been given to the testimony of this expert, nor as to whether it was sufficient to overcome the testimony of many acquaintances who expressed the belief that, until after the will was executed, she was in the possession of her normal faculties." *Van Dyke* at 65. In *Van Dyke,* the Court simply reversed the judgment of the trial court who had granted a Motion for Directed Verdict, stating that when an expert witness and lay people testify as to different facts and do not agree with each other, a jury question is generated and therefore the cause should be submitted to the jury, which is exactly what the trial court did in this case. A jury sitting on this case is not bound

by any one person's testimony, whether that person is an expert witness or a lay person.

The jury would have been free to find this even without the testimony of Attorney Steven Kahler, who testified that on two separate occasions he met with Ms. Poll individually to assess her understanding and competency to sign this contract. Attorney Kahler also testified he has engaged in this process previously, and there have been times in the past in which he refused to allow a client to sign a document, fearing they were not fully capable of executing it. Attorney Kahler is a seasoned attorney familiar with this issue and he presented facts and direct evidence to the jury on which they could certainly base their finding on.

C. The Appellant is not entitled to any Relief Based on Her Meeting of the Minds Argument.

a. Preservation of Error

Appellee disagrees that error was preserved on this issue. Although the Appellant raised this issue as a ground in her post trial Motion for Judgment Notwithstanding the Verdict, the issue has been presented to the Appellant Court under the analysis of granting a new trial on this issue. The Conservator did not raise this as a ground for new trial and never raised a ground for new trial in the District Court, and therefore the Appellee believes this argument has been waived.

b. Standard of Review

The Supreme Court reviews a District Court's ruling on the sufficiency of the evidence for corrections of errors at law. *Crow v. Simpson*, 871 N.W2d 98, 105 (Iowa 2015). The Supreme Court reviews a District Court's denial of a Motion for Judgment Notwithstanding the Verdict for corrections of errors at law. Iowa R. App. Pro. 6.907.

c. Argument

Whether this argument has been waived or not, the argument ultimately fails on the merits. Whether or not the Appellant is seeking a new trial or a judgement notwithstanding the verdict on this issue, it is clear the test for both requests is essentially the same. If a jury question is generated, the Court has no discretion but to send this issue to the jury. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839 (Iowa, 2010). If a question is not generated, then the Court does not have discretion and must enter a judgement as a matter of law. *Id.* As stated before in this brief, the Appellant does not adequately articulate her position on this issue. While she says the Defendant failed to prove the proposition that there was a meeting of the minds, she does this because she claims Ms. Poll was of unsound mind and could not understand the terms. There was no evidence presented that any of the terms were ambiguous. In fact, the real estate contract was entered into evidence and in construing contracts, the Court looks at the intent of the parties. Unless there is an ambiguity, this is done only by the written terms of the contract.

Iowa R. App. P. 6.904(3)(n) At trial, the Court instructed the jury it was the Plaintiff's burden by clear and convincing evidence that she prove Mrs. Poll was of unsound mind and was not capable of contracting. The Plaintiff did not object to this instruction.

Repackaging this argument as there was not a meeting of the minds is nothing more than semantics. It is true that as part of his breach of contract claim, the burden was on the Defendant to prove a contract existed. There is no better proof of this than the written contract itself, signed by Mrs. Poll. Even if the Court accepts this as an independent basis for an argument, that Mr. Poll did not prove his proposition that a contract existed, it is clear according to precedent that sufficient evidence was presented to the jury to prove this contention. Not only was the written contract entered into evidence, but there was also testimony of both Mr. Poll and Attorney Steven Kahler, who met with Mrs. Poll on two separate occasions privately to explain the contract to her, to evaluate her mental state, and to make sure she understood the terms of the contract.

Again, what the Appellant is asking this Court to do is reweigh the evidence and hold that the expert testimony of Dr. Bybee outweighed the evidence presented by Mr. Poll in this case. Unfortunately for the Appellant that is not the state of the law. Precedent is clear on this issue. Certainly in this case on the presentation of the written contract alone a jury question was generated, not to mention the fact

there was other evidence supporting that Mrs. Poll understood the contract. The jury was the correct fact-finder in this case and the Appellant does not have the luxury of having this Court review the facts and determine a different outcome as the case law states. If, however, the issue is as the Appellee believes and it was the Plaintiff's burden to prove Mrs. Poll was not capable of contracting, as a matter of law she is not entitled to a directive verdict. As discussed further below, the authority for a directed verdict is embodied in Iowa R. Civ. Pro 1.945, which states a party may move for the dismissal of claims at the close of evidence when the opposing party has not produced substantial evidence on each and every element of the claim. In this case, the Appellant is asking to the Court to enter judgment for her, not dismiss a claim by Mr. Poll, as there is no mechanism at trial for the summary judgment of claims, as the Iowa Rules state any Motions for Summary Judgment would have had to been on file 60 days prior to trial. That is not the case here.

II. The Plaintiff Is Not Entitled to a Judgment Notwithstanding the Verdict.

In her Motion to the District Court, the Plaintiff petitioned for a Judgment Notwithstanding the Verdict for two reasons. First, she believed she was entitled to a Directed Verdict on the issues of mental incompetence and whether Mr. Poll acted in good faith throughout the transaction. As explained below, Directed Verdicts are only used for the dismissal of claims, and as both of these claims were

asserted by the Plaintiff she is not entitled to a Directed Verdict on either of them. The Plaintiff then continues to state she deserves a Judgment Notwithstanding the Verdict because there was no material meeting of the minds. However, again she does this through the guise of Ms. Poll's mental competency, which arguably is just a reassertion of the previous argument.

a. Preservation of Error

Mr. Poll believes error was preserved on this issue by the timely filing of the Appellant's Motion for Judgment Notwithstanding the Verdict. However, because the Appellant fails to cite any authority for the proposition that a directed verdict is available for anything except the dismissal of an opposing party's claim, Appellee feels this argument has been waived pursuant to Iowa R. App. Pro. 6.903(2)(g)(3).

b. Standard of Review

Appellee disagrees with Appellant's position that review is for Abuse of Discretion. "The standard of review for a district court's denial of a motion for standard notwithstanding the verdict is for correction of errors at law." Iowa R. App. P. 6.907; *Crookham v. Riley* 584 N.W.2d 258, 265 (Iowa 1998).

c. Argument

Viewing the matter in a light most favorable to the Plaintiff, the argument fails as it would be reviewed under the same standard as a new trial. Iowa R. Civ. Pro. 1.1003 regulates the Court's power to enter a Judgment Notwithstanding the

Verdict, "on motion, any party may have judgment in that parties favor despite an adverse verdict, or the jury's failure to return any verdict under the following circumstances;… 1.003(2) if the movant was entitled to a directed verdict at the close of all evidence and move therefore, and the jury did not return such a verdict, the Court may then either grant a new trial or enter judgment as though it had directed verdict for the movant." Iowa R. Civ. Pro 1.1003. In determining a Judgment Notwithstanding the Verdict, the Court has stated "in determining whether a jury question was engendered when a party seeks a directed verdict, summary judgment, or judgment notwithstanding the verdict, the trial court views the evidence in the light most favorable to the nonmoving party regardless of whether such evidence is contradicted." *Boehm v. Allen*, 506 N.W.2d 781, 784 (Iowa App., 1993).

A. The Plaintiff Is Not Entitled to a Judgment Notwithstanding the Verdict on the Issues of Mr. Poll's Good Faith or Ms. Poll's Mental Competency because She Was Not Entitled to a Directed Verdict as a Matter of Law.

As stated above, a party is only entitled to a Judgment Notwithstanding the Verdict if they were entitled to a Directed Verdict at the close of all evidence. As the issues involved in this case, Ms. Poll's competence and Mr. Poll's lack of good faith were both raised by the Plaintiff and were part of her claims, and so she is not

entitled to a Directed Verdict as a Matter of Law, as directed verdicts only allow the dismissal of claims, not the summarily granting of them.

"A party may move for dismissal of any action or claim against the parties or for any appropriate order of the Court, if the party asserting it fails to comply with the rules of this chapter or any order of the Court. After a party has rested, the adverse party may move for dismissal because no right to relief has been shown, under the law or facts, without waiving the right to offer evidence thereafter." Iowa R. Civ. Pro. 1.945. "In reviewing rulings on a motion for judgment notwithstanding the verdict, we simply ask whether a fact question was generated." *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa, 2010). "We, like the district court, view the evidence in the light most favorable to the party against whom the motion is intended, the nonmoving party." *Id.* The Court's power to grant directed verdicts is embodied in Iowa Rule of Civil Procedure 1.945, as the Court may dismiss a claim of an adverse party after that party rests if that claim is not supported by substantial evidence in the record. In the case at bar, the Plaintiff is not entitled to a directed verdict on the issue of mental incompetence nor on the issue of Mr. Poll's question of good faith when both of these claims were items of relief sought by the Appellant, not the Appellee.

Jury instruction 19 in the case instructed the Jury that "a person is capable of making a contract unless the person lacks sufficient mental capacity to understand

it. In order to find the Plaintiff lacks sufficient mental capacity, the Plaintiff must prove this proposition by clear, convincing, and satisfactory evidence." (App. 139). In this case, it was the Plaintiff's burden to prove Ms. Poll was mentally incompetent and therefore she is not entitled to a Directed Verdict on this issue. As discussed below, even if she were entitled to a Directed Verdict as a matter of law, the argument still fails on the merits.

Regarding the issue of whether Kenneth Poll acted in good faith, the legal question is more difficult to define. As the jury was instructed, case law states that once the Plaintiff proves a confidential or fiduciary relationship exists, the burden shifts to the Defendant to prove he acted in good faith and the Plaintiff acted knowingly, intelligently, and freely. However, this is merely a presumption that is raised and incapable of being rebutted during the analysis of the claim. The Appellate Courts' precedent in this matter is clear. Once the fact-finder determines a confidential or fiduciary relationship exists, the fact-finder then must analyze whether or not the Defendant acted in good faith and the Plaintiff was acting intelligently, freely, and voluntarily. This analysis simply creates a presumption, not a claim by the Defendant. As such, the Court is required to take this question under review as part of its fact-finding mission while assessing the case under this theory advanced by the Plaintiff.

Unlike a tort theory of self defense against assault or assumption of risk in a negligence claim, the claim advanced by the Plaintiff is not required to be answered with an affirmative defense that the Defendant acted in good faith and that the Plaintiff acted freely, intelligently, and voluntarily. Instead, it is inherently part of the Plaintiff's claim that the whole transaction is fraudulent. In a case such as this, the Defendant is not seeking a right of relief, the Plaintiff is, and accordingly the Plaintiff is not entitled to a Directed Verdict under rule 1.945. What the Plaintiff is essentially attempting to do is have the Court enter Summary Judgment in her favor, however this is a remedy which is not available at trial. *See* Iowa R. Civ. Pro.1.981. (Stating all motions for summary judgment are to be filed no later than 60 days before trial).

B. The Defendant Is Not Entitled to a Judgment Notwithstanding the Verdict, because Based on the Facts Presented at Trial, She Was Not Entitled to a Directed Verdict.

Even if the Court were to find that as a matter of law a Directed Verdict was available to the Plaintiff, the Plaintiff's claims would still fail on the merits. The Defendant presented enough evidence to generate a fact question on all claims presented, which means the jury sitting as the fact-finder is the proper entity to make the decision in this case.

"Our only inquiry in assessing such a motion is to determine whether there is sufficient evidence to justify submitting the case to the jury. In making this assessment, as the district court, we view the evidence in light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference fairly and reasonably may be made. The Motion should be denied if there is substantial evidence to support each element of the Plaintiffs claims." *Brederg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa, 1996). The only claim the Defendant believes was available as a matter of law to the Plaintiff as directed verdict is the question, whether or not the Plaintiff breached the contract for sale of land. In that claim, Mr. Poll was required to prove all of the following:

1. The parties were capable of contracting.
2. The existence of a contract.
3. The consideration.
4. The Defendnat has done what the contract requires.
5. The Plaintiff has breached the contract.

In her motion for Judgment Notwithstanding the Verdict, the Appellant never challenges the finding she breached the contract, nor does she even mention this claim by the Defendant.

The claims raised by the Plaintiff are that Mr. Poll failed to prove Ms. Poll was capable of contracting and Mr. Poll failed to prove that he acted in good faith throughout the transaction, as well as that Ms. Poll acted intelligently, freely, and voluntarily. As stated above, the Defendant believes that these last two claims fail as a matter of law, as they are not available for Directed Verdict to the Plaintiff. If, however, the Court were to find they were, the Defendant believes these claims still fail on their merits, as the same test applies as the one discussed above for a new trial. There was substantial testimony entered into evidence that Ms. Poll acted freely, intelligently, and voluntarily, specifically as Attorney Steven Kahler testified he met with her on two separate occasions and determined she was competent to sign the contract. Attorney Kahler further testified he has been in this situation many times in the past and there have even been instances in which he has declined to allow a client or a party to sign a document fearing they did not understand what they were doing. Mr. Poll demonstrated to the jury his desire to ensure his mother was taken care of by taking her to her attorney and not his own, and by granting her a life estate and approximately 6 acres and the homestead on the land. In a similar case, the Appellate Court considered transactions by a fiduciary where the principal also benefited from the transaction. *See Stalzer v. Smith*, 886 N.W.2d 107 (Table) (Iowa Ct. App. 2016). A jury could reasonably conclude that Mr. Poll acted in good faith throughout the transaction.

As to the question of the breach of contract, as explained throughout this brief, there was substantial evidence to support each element of the claim. First, the parties were capable of contracting and a jury could have reasonably found Ms. Wilma Poll understood the terms of the contract. Next, there is no better proof of the existence of the contract than the written instrument that was filed in the Office of the Recorder which bore not only the signature of Kenneth but Wilma's as well. Third, the consideration in this was never seriously questioned as there were mutual promises made as Mr. Poll agreed to pay $24,000.00 to his mother and in return he would receive the 41 acres of land. Next, the Defendant did what was required under the contract because he substantially performed as soon as the question of Ms. Poll's current mental state was settled, and a Conservator was appointed, Mr. Poll immediately advanced the rest of the purchase price minus the accrued interest, as that was not ascertainable at the time. Finally, the Plaintiff freely admitted she rejected the payment in completion of the contract.

The Court properly denied the Plaintiff's Motion for a Judgment Notwithstanding the Verdict because sufficient evidence was presented on each claim to generate a jury question. Mr. Poll and Attorney Kahler each testified they believed Ms. Poll was competent to execute the contract on September 8, 2015. Further, evidence of good faith and execution of the contract was presented. In

viewing the evidence in light most favorable to the Defendant, the District Court's denial was proper.

CONCLUSION

The Court should affirm the decision of the District Court. As demonstrated above, the law and the facts support such a conclusion. The Appellant is not entitled to a new trial as the Court is free to reverse itself and correct any errors it believes it committed during the course of the proceedings. The Appellant is not able to claim surprise or irregularity because of this. Further, many of the claims advanced by the Appellant in this action were not available to be directed out as a matter of law. The rule allowing Directed Verdicts does not allow summary judgment during the middle of trial. If that was the Appellant's position, it needed to be raised pretrial in a Motion for Summary Judgment alleging there was no issue of fact. Finally, under the almost identical standards of evidence for a New Trial or a Judgment Notwithstanding the Verdict, substantial evidence was presented to the jury, and the jury sitting as the fact-finder was the appropriate body to render the decision in this case. For these reasons and all of the others discussed above, the Appellee believes the Court should affirm the verdict of the District Court.

ORAL ARGUMENT

Appellee requests to be heard at oral argument in this case.

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 8,781 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman font.

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